In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1677

UNION PACIFIC RAILROAD COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner here seeks review of a Court of Claims' order (Pet. App. 10) denying its motion of December 10, 1970, for leave to file a motion for rehearing or reconsideration of that court's decision adverse to petitioner in *Union Pacific Railroad Co.* v. *United States,* 401 F. 2d 778 (Pet. App. 11–25).[1] The decision was entered on October 18, 1968, and this Court denied a petition for certiorari on June 9, 1969 (395 U.S. 944). The alleged basis for reconsideration is a conflict in reasoning with the November 13, 1970 decision

[1] The case is still pending in the Court of Claims on a number of other as yet undecided issues.

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of the same court in *Missouri Pacific Railroad Co.* v. *United States,* 434 F. 2d 1324 (Pet. App. 26–30), certiorari denied, May 3, 1971, No. 1333, this Term.

The substantive issue in the instant case arose from petitioner's issuance for cash of bonds convertible into its common stock at a fixed price, and the subsequent exercise by bondholders of their conversion privileges. The court held that, for purposes of computing "equity invested capital" under the now repealed Excess Profits Tax,[2] the amount of money and property paid in for the stock was the cash received on issuance of the bonds, and not, as petitioner claimed, some larger amount equal to the fair market value of the stock when issued, the fair market value of the bonds when converted, or the cost basis of the bonds to the converting bondholders.

In *Missouri Pacific, supra,* to the extent relied upon by petitioner, the issue was whether, for income tax purposes, the taxpayer incurred bond discount when it issued new bonds for old stock in a bankruptcy reorganization. The court ruled that there was no discount because the old stock and new bonds were determined to be of equivalent value to the taxpayer in the course of the reorganization proceedings.

As the Court of Claims concluded in its order denying petitioner's motion here (Pet. App. 10), and as we noted in our brief in opposition in *Missouri Pacific*

[2] "Equity invested capital" was defined in Section 718 of the Internal Revenue Code of 1939. Section 718 and the other excess profits tax provisions were repealed by Section 122(a) of the Revenue Act of 1945, c. 453, 59 Stat. 568, and made inapplicable to any taxable year beginning after December 31, 1945.

(p. 9 n. 3),[3] there is no conflict between *Missouri Pacific* and the decision in *Union Pacific, supra.* Moreover, an inconsistency between two decisions of the same court would afford no basis for review by this Court.

This leaves only the question whether the court below abused its discretion in denying petitioner's motion, filed a year and a half after this Court's denial of the prior petition for certiorari, for leave to reopen the earlier proceedings. That question does not warrant further review.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1971.

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[3] We served a copy of that brief on counsel for petitioner herein. In *Missouri Pacific*, the same counsel filed an *amicus* brief on behalf of petitioner herein, urging the grant of the taxpayer's petition.

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